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82-1347

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

DIMMITT AGRI INDUSTRIES, INC.,
Cross-Petitioner,

VS.

CPC INTERNATIONAL, INC.,
Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I

QUESTION PRESENTED

Is a jury finding, based on conduct and other evidence, that the defendant "possessed the power to stabilize or control prices or exclude competition" in the relevant markets, and that the defendant "knowingly and wilfully obtained, or maintained," that power, insufficient as a matter of law, as was held by the Court of Appeals, "to overcome the presumption against monopoly power implied by [the defendant's] indisputably low market shares [21% and 16%] in the two relevant—products."?

II

PARTIES IN THE COURT OF APPEALS

The parties to the proceedings in the Court below are those named in the caption of the case in this Court.

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I

OPINIONS BELOW

The opinion of the court of appeals below is reported at 679 F.2d 516 and is reprinted as Appendix A to the original Petition for a Writ of Certiorari filed by CPC International, Inc. on January 10, 1983 in Docket No. 82-1169. The opinion of the court of appeals denying rehearing en banc is reprinted as Appendix C to the said original Petition filed by CPC International, Inc. on January 10, 1983.

II

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The decision of the court of appeals was entered on July 2, 1982. A suggestion for rehearing en banc was denied by order of October 12, 1982.

On January 10, 1983 CPC filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. (Docket No. 82-1169). Dimmitt received CPC's Petition on January 14, 1983 together with CPC's Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and pursuant to Rule 19.5 of the Rules of the Supreme Court of the United States.

III

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Federal jurisdiction in the District Court was invoked and is proper pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, and pursuant to 28 U.S.C. §§ 1331 and 1337(a).

IV

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in part that:

> "Every person which monopolizes . . . any part of the trade or commerce among the several states . . . shall be deemed guilty of a felony."

V

CONCISE STATEMENT OF THE CASE

This is an antitrust suit filed by a farmers' cooperative, Dimmitt Agri Industries, Inc. (Dimmitt), against CPC International, Inc. (CPC) and brought pursuant to Sections 4, 12 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 22, 26.

The controversy resolved in favor of Dimmitt at trial centers on CPC's unlawful possession and use of its power to control prices in and exclude competition from the national markets for cornstarch and corn syrup.

The monopolization issue was, in the regular course of pretrial proceedings, specified for trial by Dimmitt and CPC respectively as follows:

> "Defendant CPC willfully acquired, maintained and exercised the power to control prices or exclude competition in the national markets for cornstarch [and] corn syrup . . . in violation of Section 2 of the Sherman Act." (Dimmitt).
>
> "During the relevant time period, CPC did not monopolize the national market for starch or corn syrup; that is, CPC did not willfully acquire or maintain the power to control prices or exclude competition in the national market for starch or corn syrup." (CPC).

As noted by CPC in its brief on appeal, Dimmitt offered no evidence at trial on the issue of monopoly power which was intended to be limited to a showing of "CPC's percentage shares of the markets for cornstarch or corn syrup in 1971 or 1972" (*Brief of Appellant*, p. 15).

Rather, based upon clear conduct and other evidence that CPC in fact possessed and exercised the power to fix prices and exclude competition, Dimmitt was not required to rely upon a "magic number" approach to an assessment of CPC's market power. Dimmitt's case on monopoly power was firmly grounded in the evidence received by the District Court which established *prima facie* that CPC could and did exclude competition from and control prices in the national corn starch and corn syrup markets. More particularly, and without attempting a full presentation, Dimmitt's evidence on the market power point was that:

(1) CPC had itself stated and admitted that it could and would unilaterally "use price as a tool" to "control and influence competitors' investment and growth."

(2) CPC had itself stated and admitted that its unilateral action in reducing prices "would be viewed by our competitors as an arbitrary wielding of our market power."

(3) CPC had itself stated and admitted that its cornstarch pricing program—a program totally unrelated to costs—"allows upsetting or stabilization of the marketplace at our (CPC's) discretion."

(4) CPC stated and admitted that it had unilaterally instituted and effectuated a pricing policy for the express and stated purpose of "stabilizing the corn syrup market."

(5) CPC stated and admitted that its unilateral conduct had in fact "resulted in slowing or possibly killing" the efforts of farmer cooperatives to enter the cornstarch and corn syrup markets as refiners of their own products in competition with CPC.

Thus, Dimmitt's case on monopoly power was in large part based upon CPC's own admissions that, irrespective of "market percentage" considerations, CPC in fact fully possessed and exercised the power to stamp out competition and to control and stabilize prices on an industry-wide basis.

Perhaps most critically, the evidence at trial—undisputed—was that, after CPC had eliminated Dimmitt and other farmer cooperatives, it exercised its power to unilaterally and arbitrarily *raise* industry prices, and to do

so without losing a pound of volume or a single point of market share. Indeed, CPC admitted that its post-Dimmitt plan was to "keep the [industry] price just below the new investment level until we are sold out." By 1975, CPC's *profit* on corn syrup [$3.32] was approximately equal to the *price* which it had charged for that product [$3.40] while Dimmitt was still alive.

At trial CPC took an entirely calculated risk and, in answer to the overwhelming evidence on the monopoly power issue, presented but a single witness—James Eiszner, president of CPC. Eiszner, on direct examination by his counsel, did not deny—indeed could not deny—the admissions of monopoly power made by other top level CPC executives who were not produced at trial. Instead, and without reference to any qualification as an expert or to any industry-wide data base, Eiszner self-servedly opined as to the "market percentages" possessed by CPC in cornstarch and/or corn syrup. Eiszner admitted that he did not know whether CPC in fact had the power to upset or stabilize the marketplace in its discretion, and admitted that his "opinion" was not and could not be the best evidence of CPC's so-called "share of market."

Finally, and as its last defensive gesture on the issue of monopoly power, CPC offered the two so-called "market percentage" documents which formed the sole documentary predicate for its "market share" defense. The first document, page 8 of Dimmitt's Trial Exhibit 3358, is a document which is limited to the date which it bears—September, 1971. This document does not purport to be based on any reliable industry-wide data. CPC failed to provide any

testimony, expert or otherwise, to inform the District Court or the jury as to the significance, if any, of the recitals made in this exhibit. No testimony was offered or received as to when the document was authored, why it was authored, or what production and/or sale data was included or excluded from its recited "market share percentages." The undisputed record at trial was that CPC's so-called "share of market" figures in fact exclude substantial sales made by CPC to other refiners. CPC Exhibit 1372, the second, and only other document relied upon by CPC for its "undisputed low market share defense," is a document which CPC itself attacked at trial as totally deficient in setting out *actual* production or sales information pertinent to cornstarch or corn syrup. Indeed, CPC itself identified where the actual numbers pertinent to "market shares" might be found. (*TR.*, pp. 2356-2358; 2364-2366, *and see: TR.*, pp. 504 *et seq.*). It was established at trial that these "market share" numbers were available to CPC through its membership in the Corn Refiners Association but not available to Dimmitt's expert or to the public (*TR.*, p. 2366). CPC simply never offered any of the actual sales and production—market share—figures in evidence for consideration by the District Court.

Thus, assuming that, as determined by the Fifth Circuit, a "low market share" would, if uncontrovertedly established, be completely exculpatory on the question of CPC's possession of monopoly power, CPC failed to carry its evidentiary burden on this point. CPC itself attacked the trustworthiness of the evidence upon which it now relies in support of its claim that its market share never exceeded 25%. Eiszner admitted at trial that CPC failed to produce

the best evidence of its share of market, and was so soundly impeached and discredited that the jury could properly have disbelieved him on this point as well as others. CPC's production of weak evidence when strong was available can lead only to the conclusion that the strong would have been adverse, *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939).

On April 28, 1980, CPC moved the District Court for a directed verdict, and, with respect to monopolization, contended only that:

> "With respect to monopolization, there is no evidence that CPC possessed monopoly power in any relevant market, much less that CPC deliberately acquired or maintained such power." (*Record*, p. 2499, ftnt. 3).

Based on the evidence presented at trial, Dimmitt's contention in the District Court and on appeal was that there was a conflict in substantial evidence sufficient to require jury resolution of Dimmitt's Section 2 monopolization claim, especially where the evidence in part was that CPC had the power to "upset or stabilize the marketplace at its discretion" (*e.g. Brief of Appellee*, p. 1). CPC's position on its motion for judgment n.o.v. was simply:

> "A defendant with a market share of no more than 21% cannot, as a matter of law, have monopoly power, the essential prerequisite for a jury finding of monopolization. In other words, *whatever other evidence of monopoly power a plaintiff may have*, a defendant cannot possibly, as a matter of law, 'control prices or exclude competition' if its market share is as low as CPC's position in this case." (Record 2684; emphasis in original).

The District Court denied CPC's motion for a directed verdict on April 30, 1980, and thereafter properly instructed the jury on its role as a fact finder and on the offense of monopolization—instructions which are not challenged by CPC.

The jury returned its verdict on May 2, 1980, and, as pertinent here, found from a preponderance of the evidence that CPC had in fact monopolized one or more relevant markets in violation of Section 2 of the Sherman Act. Specifically, and based upon the totality of the evidence properly before it, the jury found that:

> "[CPC] possessed the power to stabilize or control prices or exclude competition"; and
> "[CPC] knowingly and wilfully obtained, or maintained, the power to control prices or exclude competition from the relevant market of corn starch or corn syrup or both" 679 F.2d 516, 532.

On May 22, 1980, CPC filed its motion for judgment notwithstanding the verdict. On August 29, 1980, the District Court found that Dimmitt's cause of action against CPC presented factual questions for resolution by the jury and entered judgment in favor of Dimmitt on the jury verdict. On September 24, 1980, CPC filed its notice of appeal from the judgment entered by the District Court.

On appeal, CPC limited itself to an assertion that it could not, as a matter of law, be found to possess monopoly power, and again stressed the conclusive effect which it sought to have attach to its magic number theory:

> "[A]t the upper and lower ends of the market share scale, *market share* is an accurate surrogate or shorthand phrase that *tells the whole story* about monopoly

> power or the absence thereof. And 25 percent, as a matter of law and as a matter of common sense, is well within the lower extreme of the market share scale, *which makes inquiry into other indicia of monopoly power immaterial and which compels the finding as a matter of law that there was no monopolization.*" (*Reply Brief*, p. 5).

Dimmitt both urged the propriety and the affirmance of the judgment entered on the monopolization offense and, pursuant to F.R.Civ.P. Rule 50(d), specifically requested that the Court of Appeals order a new trial if the Court should for any reason consider reversing the judgment entered by the District Court (*Brief of Appellant*, p. 2). After written reply by CPC, and full argument by the parties, the case was taken under submission for decision by the Court of Appeals.

On July 2, 1982 the Court of Appeals reversed the verdict and judgment on Dimmitt's cause of action for monopolization under Section 2 of the Sherman Act, and pursuant to Dimmitt's request and Fed.R.Civ.P., Rule 50(d), remanded the case for a new trial on Dimmitt's attempt to monopolize claim, 679 F.2d 531, 533-534. CPC's suggestion for rehearing en banc on the propriety of remand was denied *per curiam* on October 12, 1982.

The monopoly power question as phrased and determined by the Court of Appeals in connection with CPC's appeal of the judgment was:

> "[C]an conduct evidence, belied by undisputedly low market shares in the relevant markets, make out a completed monopolization offense.?" 679 F.2d 516, 527.

The Court of Appeals found that although "Dimmitt can, with some justice, claim to have presented one of the clearest conduct cases supportive of a monopolizing intent presented to a court since Corn Products itself [1916]," and although CPC had in fact during 1971-1972 "exercised a significant degree of control over price," nonetheless reversal of the judgment entered on the monopolization claim was required as a matter of law because Dimmitt's "conduct evidence alone is insufficient to overcome the presumption against monopoly power implied by CPC's indisputably low market shares . . ." 679 F.2d 516, 531. Thus, in reversing, the Court of Appeals in fact attached controlling and conclusive legal significance to CPC's "market share" numbers. In doing so, the Court simply ignored CPC's admissions that it had, *as a matter fact*, stabilized industry prices and killed both newly emergent and long-established corn refining ventures and companies.

Under the Fifth Circuit's opinion one can simply admit that one in fact possesses the power to upset or stabilize a marketplace at one's discretion, and, at the same time, wholly defeat jury consideration of a monopolization claim by waltzing into trial with a "market percentage" which both flies in the face of the stated admissions, and which, more importantly, is contrary to the undisputed dynamics of the marketplace as it existed during the relevant period of time. As shall be seen, this has never been the law, and the Fifth Circuit's creation of a "presumptive implication" which as a *matter of law* conclusively negates the existence of monopoly power is unsupportable in law or in proper economic theory.

Although Dimmitt believes that the Fifth Circuit acted well within its authority in ordering a new trial on Dimmitt's attempt to monopolize claim, and although Dimmitt stands ready to proceed to a new trial on that claim, Dimmitt believes, with all respect to the Court of Appeals, that the reversal of the judgment entered on Dimmitt's cause of action for monopolization is erroneous and represents a clear and unwarranted departure from the applicable decisions of this Court. Dimmitt believes that, should this Court grant the Petition for Certiorari presented by CPC, the decision of the Fifth Circuit reversing the judgment entered on Dimmitt's monopolization claim must be contemporaneously reviewed and reversed.

VI

CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The Decision of the Fifth Circuit Impermissibly Adds "High Market Share" as an Element of Proof to the Offense of Monopolization

Section 2 of the Sherman Act, 15 U.S.C. § 2 provides in part that:

> "Every person who shall monopolize . . . any part of the trade or commerce among the several states . . . shall be deemed guilty of a felony."

The application of the Sherman Act to every business practice which is unreasonably restrictive was established by the Court in *Standard Oil Co. v. United States*, 221 U.S. 1 (1910). After noting that monopolies were forbidden at common law because, *inter alia*, they sooner or later

resulted in an undue enhancement of price, the Court defined "monopoly" as used in the Sherman Act in terms of the public policy to be served and the conduct to be prohibited:

> "Undoubtedly, the words 'to monopolize' and 'monopolize,' as used in the section, reach *every act bringing about the prohibited results.* The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the pratical evolution by which *monopoly and the acts which produce the same results as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade.*" *id* 61.

In *United States v. E. I. Du Pont De Nemours,* 351 U.S. 377 (1956), the Court cited its previous decision in *Standard Oil, supra,* and elaborated on the manner in which the Supreme Court had acted to provide the Sherman Act with its intended breadth and necessary flexibility:

> "Because the Act is couched in broad terms, it is adaptable to the changing types of commercial production and distribution that have evolved since its passage. Chief Justice Hughes wrote for the Court that 'As a charter of freedom, the act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.' *Appalachian Coals, Inc. v. United States,* 288 U.S. 344, 359-360, 53 S.Ct. 471, 474, 77 L.Ed. 825." *id* 385, 386.

The *Du Pont* Court went on to specifically define monopoly power and stated:

> "Our cases determine that a party has monopoly power if it has, over 'any part of the trade or commerce among the several states,' *a power of controlling prices or unreasonably restricting competition.*" *id* 389.

In *American Tobacco Co. v. United States,* 328 U.S. 781 (1946), a unanimous Court focused squarely on the evidentiary[1] elements involved in a monopoly claim and held that:

> "the material consideration in determining whether a monopoly exists is not that prices are raised and that competition is actually excluded but that *power* exists to raise prices or to exclude competition *when it is desired to do so.*" *id* 811.[2]

Contrary to the suggestion made by the Fifth Circuit, this Court did not in *United States v. United States Steel Corporation,* 251 U.S. 417 (1920), establish 50% as a magic number in monopoly cases. The U.S. Steel Court simply *affirmed a finding,* made after an exhaustive *trial* on the merits, that the prayed for dissolution of United States Steel was not *factually* justified. In so doing, the Supreme Court properly observed that:

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[1]On the question of how monopoly power might, in certain circumstances, be *evidenced,* the Court in *United States v. Grinnell,* 384 U.S. 563 (1966) noted that:

> "the existence of such power ordinarily may be *inferred* from the predominant share of the market." *id* 571.

[2]See also *United States v. Griffith,* 334 U.S. 100 (1948), wherein the Court held:

> "the existence of power *'to exclude competition when it is desired to do so' is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise* that power." *id* 106.

> "It is true that there is some testimony tending to show that the corporation had [monopoly power], but there was also testimony and a course of action tending strongly to the contrary. The *conflict* was by the judges of the District Court unanimously *resolved* against the existence of that power, and in doing so they but gave effect to the greater *weight of the evidence.*" *id.* 297.[a]

In *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), the Supreme Court expressly recognized that market share *percentages* can produce a distorted picture of market *power* because:

> "the relative effect of percentage command of a market varies with the setting in which that factor is placed." *id* 528.

In *Byars v. Bluff News Co., Inc.*, 609 F.2d 843 (6th Cir. 1980), the Court remarked upon the historical propriety of proving monopoly power by means other than a simplistic reliance upon the "short cut formula which en-

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[a]The trial court found that as a *matter of fact*, United States Steel:

> "has *never* been able to *dominate* the steel industry by controlling the supply of raw materials, restraining production of finished products, *or* enhancing and maintaining the prices of either." *id* 295 Ftnt. 1.
>
> "did *not undersell* its competitors in *some localities* by reducing *its prices below those maintained elsewhere.*" *id* 295.

The Court specifically noted that:

> "*no competitor* came forward and said he *had to accept* the steel corporation's prices." *id* 298.
>
> "there was *no evidence* that it attempted to crush its competitors or drive them out of the market." *id* 295.

tails measuring the market share possessed by the alleged monopolist":[4]

> "As the Supreme Court noted in *American Tobacco Company v. United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946), the simplest way of showing monopoly power is to *marshal evidence showing the exercise of actual control over prices or the actual exclusion of competitors.* This was the approach taken in older cases. See *United States v. Int'l Harvester Co.*, 274 U.S. 693, 708, 47 S.Ct. 748, 71 L.Ed. 1302 (1927); *United States v. United States Steel Corporation*, 251 U.S. 417, 451, 40 S.Ct. 293, 64 L.Ed. 343 (1920). See *also United States v. Swift & Co.*, 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932).
>
> "In order to better deal with antitrust cases, courts developed what can best be described as a *shortcut formula* which entails measuring the market share possessed by the alleged monopolist. The leading case taking this approach is *United States v. Aluminum Co. of America* (*Alcoa*), 148 F.2d 416, 424, 429 (2d Cir. 1945), where Judge Learned Hand saw no need for additional analysis when confronted with evidence of massive market control. He simply pointed to the fact that Alcoa possessed a 90 percent share of the relevant market and concluded that the company possessed monopoly power." *id* 850.

In *Broadway Delivery Corp. v. United Parcel Service*, 651 F.2d 122 (2nd Cir. 1981), the Second Circuit, after review of this Court's applicable decisions, and after an

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[4]The *Byars* Court properly noted that Judge Hand's observation respecting market shares of less than 90% was not a holding, but rather a "famous dictum." *id* 850, *Ftnt.* 16. The opinion in *Alcoa* has been termed a "cryptic wishing well, into which, it sometimes seems, one may peer and find nearly anything he wishes." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2nd Cir. 1979).

extensive discussion of Judge Hand's market share dicta in *Alcoa*, held that an instruction "precluding a finding of monopoly power if the defendants' market share was less than 50%" was erroneous. *id.* at 130. Instead, that Circuit properly observed that

> "The trend of guidance from the Supreme Court and the practice of most courts endeavoring to follow that guidance has been to give only weight and *not* conclusiveness to market share evidence" *id.* (emphasis added)

Thus, under long settled and controlling legal principles established by this Court, the question of CPC's power to control prices in and/or to exclude competition from the cornstarch and corn syrup markets is one which could not and cannot, as a matter of law, be resolved by sole reference to a purported share of market—high or low. Indeed, "market share" is but a single, and, at best, rather elusive, factor which a jury may wish to view in determining whether, as a matter of fact, a firm possesses monopoly power. In the instant case, the jury in fact had evidence of both "market share" and market power before it for its full and deliberate consideration.

There is no precedent for imposing a presumption against monopoly power that cannot be rebutted by the *facts* of monopoly power. To do so would thwart the intent of the statute and cast serious doubt on the earlier rulings of this Court. Numbers conjured by the defendant should not prevail and control over all other economic facts.[8]

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[8]Thus, a basic antitrust hornbook states:

"Justice White asked few instrumental questions [in *Standard Oil v. United States*]; his inquiry was sharply focused on whether power over the price existed and was being exercised.

Additionally, and by concentrating on "market share"[8] rather than on the hard core evidence of CPC's power to control prices and exclude competition, the Court of Appeals completely ignored the fact that, as a multibillion dollar international corn refiner, CPC was, with a "mere" 20% of the national market, fully able to and, in fact, did dump its prices on corn starch and corn syrup in the national market for an extended period of time. CPC's price dump was carried out with the stated purpose and with the admitted effect of "disciplining" and "punishing" the entire industry, and so as to be able to unilaterally raise industry prices on the threat of CPC's power to force the industry back to below cost price levels—again. The assumed fact that CPC possessed a "mere" 20% of the national market was the fact which was treated by the industry and by the jury as being without controlling effect.

Given the admission of CPC that it in fact possessed the power to "upset or stabilize the marketplace at its

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It did not matter to him that the *share* of the crude market controlled by the combination was exceedingly small, since it appeared that *power* over crude prices was exceedingly large. Today, with elaborate theoretical tools for analyzing power, courts have developed a set of instrumental issues. They ask not the ultimate question, does the firm have power?, but a series of subsidiary ones like, what market does the firm engage in?, what is its share of that market?, are there entry barriers?, and the like. These instrumental inquiries are of true worth only in such degree as they throw light on the ultimate issue. Sometimes, however, they get in the way. They are allowed to block off appropriate responses toward which a more direct concern with power, such as that shown in *Standard Oil*, would lead." (emphasis added).

Sullivan, *Antitrust* at 38 (1977).

[8] In virtually all of the cases cited by the Fifth Circuit, proof of monopoly power was attempted solely through employment of the "market share shortcut formula" first used in *Alcoa, supra.*

discretion," and the other direct and compelling evidence of its actual market control, Dimmittt was not, in presenting its case on monopoly, required to evidence or rely upon a "percentage of market" *inference* that CPC possessed the power to control prices or exclude competition. Rather, Dimmmitt was entitled to marshal and offer conduct and other evidence in proof of the proposition that CPC actually possessed and exercised the power to control prices in or exclude competition from the cornstarch and corn syrup markets. It did so. Dimmitt in fact, gave the jury and the District Court overwhelming evidence in support of its monopoly claim.

The jury acted properly under instructions by the District Court to resolve the question of whether, as a matter of fact, CPC unlawfully possessed and exercised monopoly power, and the Fifth Circuit's market share "presumption against monopoly power" was and should have been weighed in the balance and not given the legally conclusive effect ascribed to it by the Court of Appeals below.

VII

CONCLUSION

The decision of the Fifth Circuit on the monopoly power issue, and its adoption of the magic number approach urged upon it by CPC, represents a clear, substantial and wholly unwarranted impediment to the statutory right of private parties and to the statutory duty of the United States to enforce the antitrust laws of the United States. The Fifth Circuit's finding that a "presumptive implication" against the existence of monopoly power as a matter of law controls over unambiguous conduct evidence demonstrating the power to control prices and exclude competition is without precedent, involves a critically important question of federal law and is in substantial conflict with the applicable decisions of this Court relied upon by cross-petitioner. As elsewhere noted by this Court:

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972)."

The prospect that Courts of the United States might, based upon the decision of the Court of Appeals below, deliver enforcement of the Congressional prohibition against monopoly into the hands of those who would manipulate numbers and deny the reality and effect of

actual conduct is one which threatens the very bedrock and fabric of our economic freedom. For these reasons, cross-petitioner respectfully prays that the Court allow issuance of its writ to review and consider the issue here presented—an issue which by definition substantially affects the present and future prosecution of monopolies under the federal antitrust laws.

Respectfully submitted,

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No. 82-1347

OCTOBER TERM, 1982

IN THE

Supreme Court of the United States

DIMMITT AGRI INDUSTRIES, INC.,
Cross-Petitioner,

v.

CPC INTERNATIONAL INC.,
Cross-Respondent.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Fifth Circuit rule correctly that CPC, with a maximum possible market share of 25%, did not as a matter of law possess monopoly power in the national markets for cornstarch and corn syrup?

LIST OF SUBSIDIARIES OF CPC INTERNATIONAL INC. PURSUANT TO RULE 28.1

CPC International Inc. ("CPC") incorporates by reference the list of its subsidiaries in Appendix D of the Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by CPC on January 13, 1983.

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On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

The cross-petition for a writ of certiorari filed by Dimmitt Agri Industries, Inc. ("Dimmitt") challenges the Fifth Circuit's decision rejecting as a matter of law the contention that CPC International Inc. ("CPC") possessed monopoly power in the national cornstarch and corn syrup markets. This cross-petition should be denied because it fails to meet the standards applied by this Court in issuing writs of certiorari.

STATUTORY PROVISION INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in pertinent part that:

> "Every person who shall monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . ."

STATEMENT OF THE CASE

To avoid repetition, CPC incorporates by reference the Statement of the Case on pages 2 through 5 of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, No. 82-1169, which was filed in this Court on January 10, 1983. Dimmitt's cross-petition relates to the Fifth Circuit's decision on the monopolization issue, the only issue that was properly before the Court of Appeals.

REASONS FOR DENYING THE WRIT

This is a case in which a jury, in response to a legally improper issue, found that CPC had monopolized two nationwide commodity markets. Dimmitt's case, essentially devoid of market share data or other structural evidence,[1] relied primarily on ambiguous and subjective internal memoranda that arguably reflected an intent on the part of their authors to control prices and exclude competition. The issue posed by Dimmitt's cross-petition, in the face of undisputed evidence that CPC's market shares were 25% or less,[2] is whether a jury should be permitted to consider such a case.

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[1] Ordinarily, a Section 2 plaintiff would offer evidence concerning market share trends, entry barriers, and other salient features of the relevant market. As the Court of Appeals noted, however, Dimmitt's structural evidence was essentially non-existent. *See* 679 F.2d at 528. Indeed, the evidence in the record, largely admitted through CPC's case, showed an industry characterized by steady growth, low entry barriers, major new entrants, recurrent overcapacity, commodity products, and intense price competition. Moreover, CPC's market shares had been steadily declining to the point that, at least in the corn syrup market, CPC was no longer the largest competitor. Under these circumstances, submission of the monopolization interrogatory to the jury was all the more extraordinary.

[2] *See* 679 F.2d at 528. While admitting that it offered no evidence concerning CPC's market shares (Cross-Petition at 3), Dimmitt attacks the quality of the market share evidence presented by

Undaunted by CPC's low market shares and other undisputed structural evidence contrary to its position, Dimmitt asserts that it proved CPC's possession of monopoly power through conduct evidence alone. Dimmitt's cross-petition should be denied because it fundamentally misconceives the requirements for proof of monopoly power, the first element of the monopolization offense under Section 2 of the Sherman Act.

A. In Deciding the Monopoly Power Issue, the Fifth Circuit's Reliance on Market Share Evidence Was Both Legally and Economically Sound.

The Fifth Circuit properly emphasized that a plaintiff assumes a heavy burden of proof in relying exclusively on conduct evidence to prove the existence of monopoly power.[3] Dimmitt accuses the Court of Appeals of adopting a "magic number approach urged upon it by CPC." *See* Cross-Petition at 19. Neither the Fifth Circuit nor CPC, however, have stated or contended that market share

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CPC. *See* Cross-Petition at 5-7. A review of the record approved by the Fifth Circuit refutes the unsupported assertions made by Dimmitt. *See* 679 F.2d at 527 & n.9. Furthermore, Dimmitt's counsel did not even cross-examine Jim Eiszner concerning his market share testimony, and Dimmitt did not challenge CPC's market share testimony in the Court of Appeals. *See* 679 F.2d at 528. Finally, Dimmitt conveniently ignores the fact that it – not CPC – had the burden of proof on the monopoly power issue.

[3] In *Broadway Delivery Corp.* v. *United Parcel Service of America, Inc.*, 651 F.2d 122 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981), a decision curiously cited by Dimmitt (Cross-Petition at 15-16), the Court affirmed judgment for the defendants on the monopolization issue "because the plaintiffs' evidence was insufficient to permit a reasonable jury to find that UPSNY possessed monopoly power." *Id.* at 130. In explaining its reasoning, the Second Circuit aptly stated the burden assumed by a plaintiff like Dimmitt which attempts to use evidence other than the defendant's market share to prove monopoly power:

> . . . We do not suggest that evidence of market share is invariably a requirement of a monopolization claim, but when such

evidence alone will decide every monopolization case.[4] While no precise figures can be given, there is surely a market share range, perhaps a range upward from 50%, in which a careful assessment of all relevant evidence concerning the monopoly power issue is required. By contrast, a market share of 25% or less simply does not square with any accepted meaning of monopoly power.

Ever since the landmark decision of Judge Learned Hand in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), market share has been the principal tool used by courts in determining whether monopoly power exists.[5] In the entire history of the Sherman Act, this Court has never upheld a finding of monopolization against a defendant whose market share was less than

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a traditional form of proof is lacking, the plaintiff must produce unambiguous evidence that the defendant has the power to control prices or exclude competition. Isolated instances of anti-competitive conduct will rarely suffice to show that a defendant's market power is substantial enough to be monopoly power. Such acts may show what power a defendant is seeking, but not necessarily what power it has.

Id. at 130 (citation omitted).

[4] The Fifth Circuit rejected CPC's supposed argument "that demonstration of a high market share has now become the *exclusive* way of proving the completed monopolization offense." *See* 679 F.2d at 526. CPC, however, has never taken such a position. Instead, CPC contends that there is a lower range of market shares which is incompatible with the existence of monopoly power and that market shares of 25% or less are within this range.

[5] *See, e.g., United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *United States* v. *E. I. Du Pont de Nemours & Co.*, 351 U.S. 377 (1956). In *Byars* v. *Bluff City News Co*, 609 F.2d 843 (6th Cir. 1979), an opinion cited and quoted at length by Dimmitt (Cross-Petition at 14-15), the Court stated that since the *Alcoa* decision, "market share has been the critical factor in § 2 antitrust cases" and "market share all but determines whether one is a monopolist." *Id.* at 850 & n.17.

75%. *See* 679 F.2d at 528 n.11.[6] In a legal context, "monopoly power" has been defined as "the power to control prices or exclude competition"[7]; from an economic standpoint, "monopoly power" is described as "the ability to raise price by restricting output."[8] Thus, while market share alone cannot resolve every monopolization case, it does represent the most direct evidence of market power because it measures the defendant's control over the supply of the product in question. Until its market share reaches a high percentage — probably about the 50% range at a minimum — a defendant could not possibly control prices in the sense of being able to raise the market price by reducing its ouput.[9]

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[6] In quoting from *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966), that the existence of monopoly power "ordinarily may be inferred from the predominant share of the market" (Cross-Petition at 13 n.1), Dimmitt fails to state that the examples given by the Court in *Grinnell* were cases in which the defendants' market shares were 80%, 87%, and 90%. *Id.* at 571.

[7] *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966) (quoting *United States* v. *E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)). This Court has emphasized that in order to possess monopoly power, a defendant must have the power to control both price and competition in the relevant market because "[i]t is inconceivable that price could be controlled without power over competition or vice versa." *United States* v. *E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 392 (1956).

[8] II P. Areeda & D. Turner, Antitrust Law ¶ 501, at 322 (1978).

[9] Standard economic analysis concerning the relationship between market share and monopoly power presupposes one "dominant" seller surrounded by "fringe" firms that are price takers. *See* Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 944 n.15 (1981). In this case, however, CPC was not only far from "dominant" under even the most liberal definition (*id.*), but also faced stiff competition from aggressive and growing new industry entrants. In the commodity markets for cornstarch and corn syrup, particularly in light of the oversupply conditions that existed during 1971 and 1972, it was all too easy for CPC's substantial competitors to undercut its prices and increase their market shares. In general, the power of a "dominant" firm depends on the elasticity of supply of the competitive fringe, *i.e.*, the ability of other suppliers to meet buyer demand at a lower price. *Id.* at 945.

B. Dimmitt Has Misconstrued and Misstated What it Means to Be a Monopolist.

Dimmitt's cross-petition raises the issue of what so-called "conduct evidence" will suffice to prove that a company has the power to control prices or exclude competition. The real question, however, is whether a company whose highest possible market share is 25% should even be subject to a claim that it possesses monopoly power. Under Section 2 of the Sherman Act, the "power to control prices" necessarily means more than merely the ability to influence prices in the market; to have monopoly power, the defendant must be able to dictate the prices that other competitors are forced to accept. *See United States* v. *E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391-92 (1956); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 427-28 (2d Cir. 1945). By the same token, the "power to exclude competition" must mean more than simply the ability to defeat a rival, because every competitor seeks to increase sales and thereby improve its market share. *See Associated Radio Service Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1356 & n.24 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

The record in this case illustrates vividly the kind of incongruous result that can occur when a jury is given the opportunity to find monopolization based solely on evidence of vigorous competitive behavior. Companies with market shares of 25% or less should be encouraged to compete aggressively without fear of being called monopolists[10] if a smaller competitor fails to survive. In order to answer a charge of monopolization effectively, a defendant must

[10] A charge of attempted monopolization could still be brought if the company had engaged in predatory conduct manifesting a specific intent to monopolize and creating a dangerous probability that it would succeed in acquiring monopoly power. In view of CPC's low market shares and equally modest market share goals (679 F.2d at 527 n.9), however, it is not surprising that the jury rejected such a charge in this case.

marshal complicated economic testimony concerning the structure of the market and barriers to entry as well as performance criteria such as profit levels, price-cost ratios, and returns on investment.[11] The case may also require proof concerning the market elasticity of demand and the supply elasticity of fringe firms.[12] Before defendants are subjected to these evidentiary burdens, and before courts and juries are required to answer the difficult issues raised in such cases, a plaintiff should be required to demonstrate that the defendant's market share is sufficient to make monopoly power at least conceivable.

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[11] *See* II P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 507-16 (1978); Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 939, 950 (1981).

[12] *See* Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 945, 958, 979 (1981).

CONCLUSION

The Fifth Circuit's decision in this case is entirely consistent with prior decisions of this Court. By any analysis, CPC did not possess monopoly power, the power to control prices or exclude competition in the relevant markets for cornstarch and corn syrup. Accordingly, Dimmitt's cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief in Opposition were sent by United States mail, first-class postage prepaid, to the following counsel of record for Cross-Petitioner, Dimmitt Agri Industries, Inc., this 16th day of March, 1983:

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